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SOORYA KUMAR NARAYANAN & ANOR

v.

PP

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COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
HASAN LAH JCA
AHMAD MAAROP JCA
[CRIMINAL APPEAL NOS: P-05-54-07 & P-05-55-07]

C

2 DECEMBER 2010

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in cannabis - Convicted and sentenced to death - Appeal against - Custody and control of drugs - Whether established - Possession - Mens rea - Whether appellants had requisite knowledge - Huge amount of cannabis seized - Whether a case of passive possession or outright trafficking - Dangerous Drugs Act 1952, s. 37(d)*

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Both the appellants were jointly charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act). The charge was that they, together at about 4.50am on 26 August 2000, under a bridge near Stadium Batu Kawan, Penang had trafficked 197,246.9 grams of dangerous drugs *ie*, cannabis. Briefly, the facts were that police teams headed by PW7 and PW9 had hidden in the bushes when a lorry bearing registration number WAX 4394 (fake plate) had driven in and stopped under the bridge. The driver (A2) and the man in the passenger seat (A1) had alighted from the vehicle and walked towards the river bank. Both were seen dragging eight gunny sacks from the river bank and loading them onto the lorry. After loading the gunny sacks and covering the rear of the lorry with a canvas, both A1 and A2 were walking towards the front part of the lorry when the police team rushed out and arrested them. Upon examination of the gunny sacks, PW7 found 32 compressed slabs of dried plant material which the government chemist (PW4), after conducting several tests, confirmed were cannabis as defined under s. 2 of the Act. At the trial, the learned judge was satisfied that (i) the plant materials seized by the police were dangerous drugs; (ii) there was no break in the chain of evidence as regards the movement of the cannabis; (iii) custody and control were satisfactorily established by the prosecution; (iv) by invoking the presumption under s. 37(d) of the Act, both A1 and A2 were presumed to have knowledge of the said cannabis and hence establishing the element of joint possession; (iv) the

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amount of the drugs was too large for personal consumption, hence prosecution had successfully proven by direct evidence the trafficking ingredient. The learned judge found that the appellants had failed to create any reasonable doubt on the prosecution's case and thus found them guilty of the charge. They were accordingly convicted and sentenced to death. The appellants appealed.

Held (dismissing the appeals; affirming the orders of the High Court)
Per Suriyadi Halim Omar JCA delivering the judgment of the court:

(1) The prosecution's evidence as regards the raid on that material morning was unassailable as the police saw what went on from their respective ambush positions. PW7 heard the sound of a boat, the gunny sacks being unloaded from that boat and the appellants thereafter loading them onto the lorry. The moment A1 and A2 took the gunny sacks from the boat, they had assumed responsibility over them, thus custody and control were established by the prosecution. The careful preparation and chain of events which culminated in the appellants' arrest that morning would reject any possibility of them being innocent handlers. The learned judge had not erred when he held that custody and control had been established in the circumstances of the case. (paras 14 & 15)

(2) There was also no error committed when allusion was made on s. 37(d) of the Act in order to establish the *mens rea* ingredient for possession. The Act allows that. The appellants had failed to rebut on a balance of probability that they had the requisite knowledge. The appellants, in their defence, had testified that a person by the name of Babuji had instructed them to retrieve contraband batik at the Batu Kawan area and thereafter transport them to Kuala Lumpur. They denied knowing the contents of the gunny sacks. However, Babuji was never called by any of the appellants. Further, Babuji's role was never put to any of the prosecution's witnesses or mentioned at the prosecution's stage even though he was supposed to have played a prominent role (*Tan Kim Ho & Anor v. PP*). The failure to put its case at the prosecution's stage whittled away the weight to be accorded to any defence.

A Also, as the appellants had put much blame on Babuji, their failure to call him and nullify the presumption of knowledge, left the prosecution's case as regards that ingredient unscathed. (paras 16 & 19)

B **(3)** The amount of cannabis seized was huge *ie*, about 197 kilograms. No clever argument could convince the court that the drugs seized were for personal consumption. This case was an elaborate set up. Evidence showed that the drugs were ferried by a boat from some embarkation point and thereafter C unloaded in the early hours of the day at the appointed place. The scenario of the evidence painted by the prosecution and strengthened by the appellant's testimony showed synchronization, professionalism and a well planned illegal act by them. This was not a case of passive possession but D outright trafficking. Thus, with the ingredients of knowledge (on a balance of probability) and trafficking (on reasonable doubt) unrebutted, the prosecution had proven its case beyond reasonable doubt. (paras 22, 23, 24 & 26)

E ***Bahasa Malaysia*** *Translation Of Headnotes*

Perayu-perayu dituduh bersama di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Pertuduhannya adalah mereka, bersama-sama pada pukul 4.50 pagi tarikh 26 Ogos 2000, di bawah sebuah jambatan berdekatan dengan Stadium Batu Kawan, Penang, telah F mengedar 197,246.9 gram dadah berbahaya iaitu cannabis. Secara ringkas, fakta-faktanya adalah beberapa pasukan polis yang diketuai PW7 dan PW9 telah menyembunyi dalam rimbunan apabila sebuah lori dengan nombor pendaftaran WAX 4394 (nombor pendaftaran palsu) telah memandu ke dalam dan berhenti di bawah jambatan. G Pemandu (A2) dan lelaki di tempat duduk penumpang bahagian depan (A1) telah turun dari kenderaan dan berjalan ke arah tebing sungai. Kedua-dua dilihat menyeret lapan guni dari tebing sungai dan memuatkan guni-guni tersebut ke dalam lori. Selepas memuatkan guni-guni tersebut dan menutupi belakang lori dengan H sekeping kanvas, kedua-dua A1 dan A2 berjalan ke arah bahagian depan lori apabila pasukan-pasukan polis terus keluar dari tempat sembunyi dan menangkap mereka. Atas peperiksaan guni-guni tersebut, PW7 mendapati 32 kepingan mampat bahan tumbuhan kering yang ahli kimia kerajaan (PW4), selepas menjalani beberapa I ujian, mengesahkan ia adalah cannabis seperti yang dinyatakan di

bawah s. 2 Akta. Pada masa perbicaraan, yang arif hakim puas hati bahawa (i) bahan tumbuhan kering yang dirampas oleh pihak polis adalah dadah berbahaya; (ii) tiada pencelahan dalam rangkaian keterangan mengenai pergerakan cannabis; (iii) jagaan dan kawalan telah dibuktikan oleh pihak pendakwaan; (iv) dengan menggunakan anggapan s. 37(d) Akta, kedua-dua A1 dan A2 dianggap mempunyai pengetahuan mengenai cannabis tersebut dan oleh itu membuktikan elemen milikan bersama; (iv) jumlah dadah adalah terlalu banyak untuk dijadikan penggunaan persendirian, oleh itu pihak pendakwaan telah berjaya membuktikan melalui keterangan terus unsur pengedaran. Yang arif hakim mendapati perayu-perayu telah gagal mewujudkan apa-apa keraguan munasabah ke atas kes pendakwaan dan oleh itu mendapati perayu-perayu bersalah. Perayu-perayu disabit dan dihukum mati. Perayu-perayu merayu.

Diputuskan (menolak rayuan-rayuan; mengesahkan perintah Mahkamah Tinggi)
Oleh Suriyadi Halim Omar HMR menyampaikan penghakiman mahkamah:

(1) Keterangan pihak pendakwaan mengenai serbuan yang diadakan pada pagi tersebut tidak dapat dipersalahkan kerana polis telah melihat apa yang berlaku dari tempat sembunyi mereka. PW7 telah dengar bunyi sebuah bot, guni-guni tersebut dipunggah dari bot itu dan perayu-perayu seterusnya memuatkan guni-guni tersebut ke atas lori. Pada masa A1 dan A2 mengambil guni-guni tersebut dari bot tersebut, mereka dianggap mempunyai tanggungjawab ke atas guni-guni tersebut, oleh itu jagaan dan kawalan dibuktikan oleh pihak pendakwaan. Persediaan rapi dan rantai-rantai peristiwa yang memuncak ke penangkapan perayu-perayu pagi itu akan menolak sebarang kemungkinan mereka adalah pembantu-pembantu tidak bersalah. Yang arif hakim tidak bersalah apabila beliau memutuskan bahawa jagaan dan kawalan telah dibuktikan dalam keadaan kes ini.

(2) Tiada kesalahan dilakukan dengan rujukan dibuat kepada s. 37(d) dalam membuktikan unsur mens rea untuk milikan. Akta membenarkannya. Perayu-perayu gagal untuk menyangkal pada satu seimbangan kebarangkalian yang mereka mempunyai pengetahuan yang diperlukan. Perayu-perayu, dalam pembelaan mereka, telah memberi keterangan bahawa seseorang bernama Babuji telah mengarahkan mereka untuk mendapatkan batik

barang seludup di kawasan Batu Kawan dan seterusnya untuk mengangkut mereka ke Kuala Lumpur. Perayu-perayu menafikan berpengetahuan mengenai kandungan guni-guni tersebut. Tetapi, Babuji tidak dipanggil oleh perayu-perayu. Seterusnya, peranan Babuji tidak dikemukakan kepada saksi-saksi pihak pendakwaan atau disebut di peringkat pendakwaan walaupun ia dikatakan Babuji memainkan peranan penting (*Tan Kim Ho & Anor v. PP*). Kegagalan mengemukakan kesnya di peringkat pendakwaan meraut penimbangan berat yang patut diberikan kepada sebarang pembelaan. Juga, oleh kerana perayu-perayu telah mempersalahkan Babuji, kegagalan mereka untuk memanggilnya dan membatalkan anggapan pengetahuan, meninggalkan kes pendakwaan berhubungan unsur tersebut tidak dilukai.

(3) Jumlah cannabis yang dirampas adalah sangat besar iaitu 197 kilogram. Tiada hujahan yang boleh meyakinkan mahkamah bahawa dadah-dadah yang dirampas adalah untuk kegunaan sendiri. Kes ini adalah satu rancangan yang terperinci. Keterangan menunjukkan bahawa dadah-dadah tersebut dibawa dengan bot dari satu tempat dan telah diletakkan pada awal pagi di tempat yang ditetapkan. Senario keterangan yang dilakarkan oleh pendakwaan dan diperkukuhkan oleh testimoni perayu-perayu menunjukkan penyegerakan, profesionalisme dan perbuatan haram yang dirancang dengan baik oleh mereka. Ini bukan kes pemilikan pasif tetapi pengedaran jelas. Oleh itu, dengan unsur-unsur pengetahuan (pada satu seimbangan kebarangkalian) dan pengedaran (pada keraguan munasabah) tidak dipatahkan, pendakwaan telah membuktikan kes melampaui keraguan munasabah.

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case [1995] 3 CLJ 639 CA ***(refd)***

Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***

Liew Siew & Anor v. PP [1969] 1 LNS 90 HC ***(refd)***

Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***

Ong Ah Chuan v. PP And Another Appeal [1980] 1 LNS 181 PC ***(refd)***

Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***

PP v. Abdul Manaf Muhamad Hassan [2006] 2 CLJ 129 FC ***(refd)***

PP v. Hairul Din Zainal Abidin [2001] 6 CLJ 480 HC ***(refd)***

PP v. Mohd Farid Mohd Sukis & Anor [2002] 8 CLJ 814 HC ***(refd)***

Tan Kim Ho & Anor v. PP [2009] 3 CLJ 236 FC ***(refd)***

Teng Howe Sing v. PP [2009] 3 CLJ 733 FC ***(refd)***

Legislation referred to:
Dangerous Drug Act 1952, ss. 2, 37(d), (da), 39B(1)(a)
Penal Code, s. 34

For the 1st appellant - Gurbachan Singh; M/s Bachan & Kartar
For the 2nd appellant - Bernard George; M/s Tay, Bernard & Cheong
For the respondent - Siti Rafidah Zainuddin AG's Chambers

[Appeal from High Court, Pulau Pinang; Criminal Trial No: 45-46-2001]

Reported by Suhainah Wahiduddin

JUDGMENT

Suriyadi Halim Omar JCA:

[1] Both appellants were jointly charged under s. 39B(1)(a) of the Dangerous Drug Act 1952 (the Act) read together with s. 34 of the Penal Code. The charge was that they, together at about 4.50am on 26 August 2000, under a bridge near Stadium Batu Kawan, Bukit Tambun, Seberang Perai in Penang had trafficked 197, 246.9 grams of dangerous drug ie, cannabis. At the end of the trial they were found guilty by the learned judge and sentenced to death. The appellants filed the notices of appeal and we heard them. At the end of the hearing we dismissed the appeals and affirmed the High Court orders.

[2] The brief facts of the case are as follows. On 26 August 2000 at about 4.30am a police team consisting of six officers and 24 personnel led by inspector Mohd Razi bin Ismail (PW7) went to the area near a bridge at Stadium Batu Kawan, Bukit Tambun, Seberang Perai, Pulau Pinang. On arrival at that place the police team was divided into four smaller teams. PW7 and chief inspector Sam Phan a/l Prat Deng (PW9) with their respective teams, hid in the bushes under the bridge at the right side of a 'jalan tanah merah' (track road), which led to the river bank. PW7 and his team hid behind the trees at the left side of that track road.

[3] A few minutes before 4.50am PW7 and PW9 heard the sound of a motorboat coming from the river bank. At 4.50am they saw a lorry bearing registration number WAX 4394 (fake plate), driven from the main road into the track road in a reverse manner

A and stopping under the bridge. The driver, a male Indian ie, one Moorthy a/l Veerapan (A2), alighted from the lorry. Another male Indian ie, Soorya Kumar a/l Narayanan, the 1st appellant (A1) also alighted from the passenger seat and joined A2. Together they walked towards the river bank. According to PW7 there was B no one else in the lorry. He evinced that he saw both of them dragging 8 gunny sacks, one at a time, from the river bank and loading them onto the lorry. Before the gunny sacks were loaded onto the lorry A1 and A2 had brought down some chairs from it first. These chairs had been brought all the way from Kuala C Lumpur. After loading the gunny sacks onto the lorry A1 and A2 loaded back the chairs and thereafter covered the rear of the lorry with canvass. PW7 then saw A2 walking back towards the driver's seat and at the same time A1 walking towards the passenger's seat. At about this time the police team rushed out and arrested D them. Being unprepared they failed to arrest anybody from the boat as it sped off.

[4] Upon examination of the gunny sacks, PW7 found 32 compressed slabs of dried plant material suspected to be cannabis E (an average of 30 slabs per gunny sack). After arresting them PW7 brought A1 and A2 and the exhibits to the Pulau Pinang Police Contingent Headquarters. He marked all the exhibits (signed and dated), prepared a search list (P23 and P24) and lodged a police report (P22). At about 11am he handed over all F the exhibits to the investigating officer (PW8) for further action. On 28 August 2000 at 12.09pm. PW8 sent all the exhibits to the Chemist Department for analysis.

[5] The Government Chemist, one Eliza binti Mat Nori (PW4) conducted several tests on the exhibits namely the physical test, G microscopic test, dequinois levine test and thin layer chromatography test. Upon analysis, PW4 confirmed that the compressed slabs were cannabis as defined under s. 2 of the Act.

[6] The learned judge was satisfied that the plant materials H seized by the police in the raid were dangerous drugs ie, cannabis weighing 197,246.9 grams. He was also satisfied that no break in the chain of evidence as regards the movement of the said cannabis had occurred. Custody and control were also satisfactorily established by the prosecution. By invoking the

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presumption under s. 37(d) of the Act, both A1 and A2 were presumed to have knowledge of the said cannabis inside the gunny sacks and hence establishing the element of joint possession.

[7] The other element needed to be established was the ingredient of trafficking. The learned judge opined that the amount was too large for personal consumption and therefore were for the open market. Without any need to rely on s. 37(da) of the Act, what with the law disallowing any invocation of another presumption provision, the learned judge held that the prosecution had successfully proven by direct evidence the trafficking ingredient. He thereupon called their defence.

Defence Stage At The High Court

[8] Come the defence stage, under oath, A1 testified that he was employed in a mini market and lived at Batu Caves, Kuala Lumpur. His wife and children on the other hand lived in Penang. He knew that A2 lived in Kuala Lumpur but did not know the exact address. He met A2 at Batu Caves before but never spoke to him.

[9] On 25 August 2000 he went to Penang to meet his wife and three children who resided with her mother at Farlim Air Hitam. He testified in defence that on that same morning a person by the name of Babuji had telephoned him requesting him to meet up with A2. A1 was instructed by Babuji to retrieve contraband batik at the Batu Kawan area and at the same time act as a guide to A2 as he was unfamiliar with that area. He telephoned A2 and they agreed to meet at the Juru toll plaza. He thereupon went there by car whilst A2 drove a lorry. He left his car at that toll plaza and joined A2 in his lorry. From 11pm onwards they waited for a call from Babuji as A1 was informed by Babuji that he would call back later. At about 3am Babuji called back, and requested him to go to Batu Kawan to pick up the 'untaxed batik' and thereafter transport them to Kuala Lumpur.

[10] For that night's job, A1 testified that he would be paid RM200. He previously had carried out similar tasks but at different places. He denied knowing the contents of the gunny sacks to be cannabis. He was unable to smell the cannabis in the gunny sacks as they were covered with mud. As the goods to be retrieved

were supposed to be contrabands it was thus appropriate that they be fetched very early in the morning. Upon arrival at Batu Kawan he saw a boat with two persons. One of them disembarked and stepped into the mud while the other person, who remained onboard, unloaded gunny sacks from it. The person outside the boat then dragged the gunny sacks towards the shore. A1 then took over the retrieval of the gunny sacks by dragging them from the shore and thereafter loading them onto the lorry. A1 testified that he had to drag the gunny sacks 8 times onto the lorry. On completion, together with A2, the gunny sacks were covered with the earlier mentioned chairs. It was when they were about to leave the place that the police came out of their hiding places and had them arrested. A1 denied putting up any struggle when arrested or had attempted to run away.

[11] A2, the driver, in his defence briefly said the following. He said he resided at Batu Caves, Kuala Lumpur and worked as a part time lorry driver. When in Kuala Lumpur he met a person by the name of Babuji who directed him to send furniture to Penang. As he did not know Penang, Babuji told him that a guide would meet him at the Juru toll plaza. A2 admitted that he had previously worked for Babuji and had on one occasion borrowed RM500 from him. Four weeks before the incident pursuant to a request for a loan Babuji had agreed to grant him RM4,500 after returning from Penang.

[12] That same night he met A1 at that toll plaza. There he was informed by the latter that he was required to transport some contraband batik back to Kuala Lumpur. As the contrabands had yet to arrive they did not go to the rendezvous immediately. After receiving the necessary instruction from Babuji they proceeded to a bridge which was near a river. They waited for a while and then a boat berthed nearby. There were two persons in the boat and the crew unloaded goods from it. A1 then retrieved those goods and he helped to load them onto the lorry. While they were arranging the goods the police rushed out and ordered them not to flee or risk being shot. He saw A1 running away from the lorry. He admitted struggling with the police on account of not knowing why he was arrested. He even attempted to prevent the police from handcuffing him. Only when the police had shown the contents of the gunny sacks did he know that the goods were cannabis. He gave a cautioned statement to the police and was tendered and marked as D30 in court.

[13] It is trite law that when a court invokes s. 37(d) of the Act (as in this case in order to establish knowledge of the cannabis inside the gunny sacks), and to succeed in rebutting the presumptive provision, the appellants must rebut it on a balance of probability (*Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311). The learned judge found that the only available evidence in support of the want of knowledge was found in their oral testimony, statements that were insufficient to rebut the presumption of knowledge. The failure by both appellants to call Babuji in support of their assertions was not taken too kindly by the learned judge. He opined that mere naming of Babuji as the main culprit, and not suggesting at the prosecution's stage of his role, did not help their tenuous defence. The surrounding circumstances of the case, especially the appellants being at the scene of the crime at 3am (and in the dark), the average weight of each gunny sack being about 30 kilograms, and the appellants attempting to escape when pounced by the police, did not help their attempts to rebut the said presumption of knowledge on a balance of probability. And neither was the ingredient of trafficking rebutted on reasonable doubt. The learned judge in the end found that the appellants had failed to create any reasonable doubt on the prosecution's case and thus found them guilty of the charge. They were accordingly convicted and sentenced.

At The Court Of Appeal Stage

[14] We found that the prosecution's evidence as regards the raid at that material morning was unassailable as the police saw what went on right under their noses from their respective ambush positions. PW7 heard the sound of a boat, and also saw the gunny sacks being unloaded from that boat, and the appellants thereafter loading them (eight gunny sacks), onto the lorry. The presence of the police and their arrests were never denied. The appellants did not differ much with the story of the prosecution except denying knowing the contents. They countered that they thought the goods were contraband batik.

[15] It was obvious that the responsibility of the boatmen over the gunny sacks ended the moment A1 and A2 assumed responsibility over them. In legal jargon, we were satisfied that the moment the baton was passed to the appellants ie, when the gunny sacks changed hands, custody and control were established

by the prosecution. Learned counsel, in his argument attempted to convince us that the appellants were mere handlers, and could not be construed as having custody and control over the gunny sacks. This argument was ventilated on account of the short time the appellants kept the gunny sacks, as the police came out from the bushes rather too early; we were unwilling to accede to the interpretation that a long period of time must exist first before custody and control could be said to have been successfully established. To agree to the appellants' arguments would make all previous cases, where drugs were physically hidden somewhere else (and hence discounting physical handling), though exclusively known only to an accused person, redundant, as the time factor may not be easily established. The careful preparation and chain of events which culminated in the appellants arrest that morning would reject any possibility of them being innocent handlers. We were therefore satisfied that the learned judge had not erred when he held that custody and control had been established in the circumstances of the case.

[16] There was also no error committed when allusion was made on s. 37(d) of the Act in order to establish the *mens rea* ingredient for possession. The Act allows that. Having sifted the evidence we were equally satisfied, not unlike that of the learned judge that the appellants had failed to rebut on a balance of probability that they had the requisite knowledge. Babuji, a former employer of A2, apart from being his financial benefactor (as alleged in his oral testimony) and who gave all the orders was never called by any of the appellants. It would not have been difficult for the appellants to track him down as they had previous dealings with him. Certainly his testimony would go a long way to support their assertion of lack of knowledge had he come forward to testify.

[17] Further, Babuji's role was never put to any of the prosecution's witnesses or mentioned at the prosecution's stage even though he was supposed to have played a prominent role, as gauged from D30 (*Tan Kim Ho & Anor v. PP* [2009] 3 CLJ 236; *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case* [1995] 3 CLJ 639). Except for the defence of *alibi*, the prosecution will be unable to know what the defence of the appellants will be, unless disclosed at the prosecution's stage. Such revelation at that stage prevents surprises and miscarriage of justice. Founded on that premise, a litany of cases has established

that unless the accused person's defence is divulged at the earliest possible moment, it then must be an afterthought. This failure to put its case at the prosecution's stage whittles away the weight to be accorded to any defence. But it must be hastily added that, at the end of the day it still does not relieve the prosecution of its duty to prove its case beyond reasonable doubt (*Alcontara Ambross Anthony v. PP* [1996] 1 CLJ 705).

[18] The appellants counsel did ventilate in the course of the appeal that a cautioned statement was recorded from A2 wherein Babuji's name and role were made known to the police. On that basis the appellants thus had done their bit to supply their defence at a very early stage. Having considered the evidence in totality we held the view that by this failure to suggest Babuji's name at the prosecution's stage, the latter could not be defaulted if they were misled to believe that Babuji would play no key role in the appellants defence. Without any fair warning it would be nigh impossible for the prosecution to speculate that D30 would eventually be tendered. It was obvious here that the appellants had deliberately kept their defence well-hidden in their sleeves and had caught the prosecution off-guard.

[19] Additional to the above ground, as the appellants had cleverly submitted that Babuji's name had been implicitly mentioned at the prosecution's stage, by virtue of the police having recorded D30, they also canvassed that it was for the prosecution to call Babuji. This submission was based on the general principle that it was incumbent upon the prosecution to establish its case beyond reasonable doubt hence that duty to call him. We were unable to accede to this submission too in the circumstances of the case as the prosecution's case had already successfully established a *prima facie* case without the need to call Babuji. Notwithstanding the established general principle that it is incumbent upon the prosecution to establish its case, by no account is there any no legal requirement that demands the prosecution to patch-up any flaws in the appellants' defence. With the legal burden on the shoulders of the appellants to rebut the presumption of s. 37)(d) of the Act on a balance of probability no adverse inference thus may be held against the prosecution for the non-calling of Babuji here (*Liew Siew & Anor v. PP* [1969] 1 LNS 90; *PP v. Mohd Farid Mohd Sukis & Anor* [2002] 8 CLJ 814). In a nutshell as the appellants had put much blame on Babuji, their failure to call him and nullify the presumption of knowledge, left the prosecution's case as regards that ingredient unscathed.

[20] The appellants argued that the learned judge did not use s. 2 of the Act to arrive at a finding of trafficking. They submitted that no court of law could conclude that trafficking had been established purely on the weight of the drugs. It was also argued that there was grave misdirection by the learned judge unless there was positive affirmative finding of possession. Further it would be pure speculation that the cannabis was meant for open market (*PP v. Hairul Din Zainal Abidin* [2001] 6 CLJ 480).

[21] It was undeniable that the amount of cannabis seized was huge ie, about 197 kilograms. No clever argument could convince us that the drugs seized were for personal consumption (*Ong Ah Chuan v. PP And Another Appeal* [1980] 1 LNS 181; *PP v. Abdul Manaf Muhamad Hassan* [2006] 2 CLJ 129). Basic common sense persuaded us that if that huge amount seized was not meant for personal consumption then it must be for the open market.

Was It Mere Passive Possession Rather Than Trafficking?

[22] This is not one of those run of the mill cases where a person is charged for trafficking either for being in possession of a bag full of drugs when *en route* to some place, or had led the police to a stash of drugs at a hidden place, but one that is clearly distinguishable to all of them. This case involves nothing short of an elaborate set-up and logically must be quite a costly enterprise. How could it not be as the evidence showed that the drugs were ferried by a boat from some embarkation point and thereafter unloaded in the early hours of the day at the appointed place, and precisely about that time, a lorry comes along to assume responsibility? No less than four persons were involved in this operation too.

[23] The scenario of the evidence painted by the prosecution and strengthened by the appellants' testimony showed synchronization, professionalism and a well planned illegal act by them. The whole operation:

(a) involved people from Kuala Lumpur and Penang;

(b) was spiced with a dash of international element as the gunny sacks had Thai characters on them;

(c) was efficiently undertaken as the whole exercise was completed in a short while;

(d) took place very early in the morning ie, 4.50am;

(e) the appellants knew the size of the drug as they brought a lorry along;

(f) the registration number of WAX 4394 was a fake one. This was confirmed by SP6 when he said that the registration number was for a van (Ford Econoven) and not a lorry (Isuzu);

(g) they must have pre-planned and timed their arrival with that of the two men in the boat;

(h) they drove from the main road onto the track road in a reverse manner as if they knew the precise location where the boat would stop;

(i) they unerringly halted and waited where the boat would berth as if they had done this before;

(j) they were well prepared as they used the furniture brought from Kuala Lumpur to hide the drugs from prying eyes; and

(k) they put up a struggle when arrested and in the course of which A1 was injured (*Parlan Dadeh v. PP* [2009] 1 CLJ 717; *Teng Howe Sing v. PP* [2009] 3 CLJ 733).

[24] All the above early preliminary acts, like meeting up at the Juru plaza toll, the preparatory acts, the overt conduct and the like, and the huge amount of cannabis seized confirmed that this was not a case of passive possession but outright trafficking.

[25] In the course of our maximum evaluation of the evidence we also noticed the following obvious contradictions in the appellants' evidence which weakened their story further. To start with, the contents of A2's cautioned statement (D30) differed with his oral testimony, as regards the history of the lorry. In open court A2 divulged that the lorry was owned by one Ravi and not by him. Yet in D30, he said the lorry carrying the registration number of WAX 4934, was bought by Babuji for his family's use, and once in a while to transport goods to Penang. The fact that the lorry used a fake number did no favours to his case either. As the lorry had been with him for quite awhile the only irresistible conclusion one could arrive at was that he must have personally affixed the fake plate on the lorry.

A **[26]** In his oral evidence he testified that RM4,500 was part of a loan request whilst D30 indicated otherwise. In D30 it was recorded that Babuji paid him RM500 before leaving for Penang and was promised another RM4,500 after returning from there with the goods. As he must stand by his own evidence, we
B concluded that a fee of RM5,000 was too large an amount, merely for transporting contraband batik to Kuala Lumpur.

[27] With the ingredients of knowledge (on a balance of probability), and trafficking (on reasonable doubt), unrebutted, we
C found that the prosecution had proven its case beyond reasonable doubt. We henceforth dismissed the appeals and affirmed the High Court orders.

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